Supreme Court, U.S.
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No. 99-859

In the
Supreme Court of the United States

CENTRAL GREEN CO.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Can the United States benefit from flood control immunity for damage caused by waters held and released only for irrigation purposes?

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INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae.[1] Written permission to file this brief has been obtained from all parties and has been lodged with the Clerk of the Court.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska. PLF has a long history of advocacy before this Court and has participated in numerous cases involving the interpretation of federal laws. For example, PLF was amicus curiae in *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Bennett v. Spear*, 520 U.S. 154 (1997); *Douglas County, Oregon v. Babbitt*, 516 U.S. 1042 (1996); *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995); and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

PLF seeks to augment the arguments of Petitioners by discussing the factors that make intercircuit conflicts intolerable, and addressing why the conflict should be resolved in this case. PLF believes its public policy perspective and

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

litigation experience will provide an additional viewpoint on the legal issues presented.

STATEMENT OF THE CASE

The Central Green Company owns 1,000 acres of pistachio orchards in Madera County, California. The Madera Canal is a federal water management project that runs through Central Green's property, conveying irrigation water throughout the San Joaquin Valley. Leaks in the canal have damaged Central Green's orchard. The United States owns the Madera Canal but has entered into an agreement giving the Madera Irrigation District and the Chowchilla Water District authority to operate and maintain the canal. Central Green sued the United States and the Madera Irrigation District under the federal Tort Claims Act, alleging that negligent planning, design, construction, or maintenance led to the leaks that caused surface and subsurface damage to Central Green's property.

The United States responded by claiming immunity under section 702c of the Flood Control Act, which prevents suits "for any damage from or by floods or flood waters at any place." Although flood control is not one of the stated purposes of the Madera Canal, the Madera Canal is part of the Central Valley Project, which has flood control as one of its congressionally authorized purposes. The district court and the Ninth Circuit ruled that, because the Madera Canal is part of a project that Congress authorized for flood control purposes, section 702c immunizes the United States from suit, even though the Madera Canal itself is not used for flood control, and the leaks at issue here were not caused by flood conditions.

SUMMARY OF ARGUMENT

The Flood Control Act of 1928 provides, in part, that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. § 702c. Because the Circuit Courts have

adopted conflicting interpretations of the phrase "from or by floods or flood waters," plaintiffs in some circuits are denied remedies that are available in other circuits. This Court should grant the petition to resolve this conflict.

Under guidance from Congress, legal scholars have studied circuit conflicts to determine which conflicts are so intolerable as to require resolution. The study claims that conflicts between the circuits are most intolerable where the conflict leads to different outcomes for litigants in different circuits, as the conflict presented in this case does. This conclusion has less to do with the importance of the issue involved than with the impact of the conflict upon litigants. The study concluded that the most intolerable of conflicts are those that are outcome-determinative; the difference in the rules applied in the different circuits determines which party wins. The conflict presented in this case is intolerable because it determines the very availability of a remedy. Because of the importance of consistency in the application of federal law, conflicts, like this one, require resolution.

This issue will not benefit from further "percolation." The conflict has persisted for many years, despite many judicial interpretations, and notwithstanding pointed invitations for Congress to resolve the issue. Circuit courts have expressly rejected the reasoning of other circuits. There is no reason to think that resolution in some other manner is forthcoming.

Lastly, this Court should resolve the conflict because Congress has not. The law is on the books and affects real litigants, such as the Petitioner. Even if the immunity provision aches for congressional clarification, the judiciary must work with what it has. In this case, the Flood Control Act has provided a grant of immunity that has generated a snarl of interpretations that both helps and harms comparable plaintiffs merely on the basis of geography. Determining the meaning of a statute certainly falls within the responsibilities of this Court.

ARGUMENT

The Flood Control Act of 1928 provides, in part, that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. § 702c. Justice Stevens has explained that this

> sentence has assumed greater and greater importance because it has provided the Government with a defense to claims for personal injury and death caused by federal negligence, gross negligence, and even "conscious governmental indifference to the safety of the public."

Hiersche v. United States, 503 U.S. 923, 924 (1992) (quoting *United States v. James*, 478 U.S. 597, 600 (1986)), *denying cert.* Unfortunately, the scope of Flood Control Act immunity differs depending upon which Circuit Court of Appeals a lawsuit is brought in.

Justice Stevens has also noted that

> [i]n some Circuits the Government's flood-control immunity would not constitute a defense in the case of injuries resulting from Government conduct that was unrelated to any flood-control purpose.

Id. at 925. In other circuits, however flood control immunity is a defense.

Legal scholars have studied circuit conflicts to determine which conflicts are so intolerable as to require resolution. Justice Stevens has cited these studies in support of his suggestion that the conflict at issue in this case is in fact tolerable and can better be resolved by Congress. *Hiersche*, 503 U.S. at 925 ("This Court has a duty to resolve conflicts among the courts of appeal. As several scholars have recognized, however, that duty is not absolute. Some conflicts are

tolerable. Others can be resolved more effectively by Congress.").

Contrary to Justice Stevens' view, however, a careful examination of the conflict involved here reveals that it is among those most deserving of review by this Court.

I

THE CONFLICT INVOLVED IN THIS CASE IS INTOLERABLE BECAUSE IT UNFAIRLY DENIES A REMEDY TO TORT VICTIMS IN SOME CIRCUITS WHILE ALLOWING REMEDIES IN OTHER CIRCUITS

In section 302 of the Judicial Improvements Act of 1990, Congress adopted a recommendation of the Federal Courts Study Committee and requested the Federal Judicial Center

> to conduct a study and submit to the Congress a report . . . on the number and frequency of conflicts among the judicial circuits in interpreting the law that remain unresolved because they are not heard by the Supreme Court.

Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 302, 104 Stat. 5089 (amended 1992). Congress specifically directed the Federal Judicial Center to consider "all relevant factors," including whether the conflict

> (1) imposes economic costs or other harm on persons engaging in interstate commerce;
>
> (2) encourages forum shopping among circuits;
>
> (3) creates unfairness to litigants in different circuits, as in allowing Federal benefits in one circuit that are denied in other circuits; or
>
> (4) encourages nonacquiescence by Federal agencies in the holdings of the courts of appeals for

> different circuits, but is unlikely to be resolved by the Supreme Court.

Id. The purpose of the study, according to the legislative history of section 302, was "to determine objectively those conflicts that are 'intolerable' and yet, for whatever reason, are unlikely to be resolved by the Supreme Court." Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. Pitt. L. Rev. 693, 798 (1995). The legislative history also makes clear that the sponsors of section 302 defined tolerability with reference to the four factors listed above. The study, conducted by Professor Arthur D. Hellman, considered each of those factors in an effort to determine, in part, which intercircuit conflicts are most intolerable.

After analysis, the list of truly significant factors was narrowed. For example, Professor Hellman concluded that "[t]he danger of 'encouraging nonacquiescence by Federal agencies' in decisions of the regional court of appeals can almost be ruled out as a factor that would make unresolved conflicts intolerable." Hellman, *By Precedent Unbound* at 772. This is so because the number of challenges to agency policies or practices of general applicability is small, and the number of cases that "posed a serious threat to uniformity in agency operations was minuscule." *Id.* Hellman also concluded that "[e]ncouragement of forum shopping is not a factor that requires independent consideration in analyzing the tolerability of unresolved conflicts." *Id.* This is because forum shopping is not an inherent evil. It is only evil when a change in applicable law between fora imposes different obligations or leads to different outcomes. Thus, concerns about forum shopping are subsumed in the factors addressing harm to multicircuit actors and unfairness to litigants in different circuits.

Ultimately, Professor Hellman concluded that

> the key to tolerability is effect on outcomes. Unless the choice between competing rules leads courts to reach divergent results in similar cases, none of the consequences that concerned the Study Committee are likely to materialize.

Id. at 785. A conflict is most intolerable where "the difference in circuit law is likely to produce different outcomes in later cases." *Id.* at 773.

The conflict involved in this case is intolerable because it unfairly denies a remedy to tort victims in some circuits while allowing remedies in other circuits. The Ninth Circuit "recognize[d] that had this case been instituted in the Fourth, Seventh or Tenth Circuit the government would probably not enjoy flood control immunity." *Central Green Co. v. United States*, 177 F.3d 834, 839 (9th Cir. 1999). Thus, plaintiffs who are injured, or whose property is damaged, because of government negligence can pursue recovery in these other circuits. Yet in the Ninth Circuit they are turned away.

Under the Ninth Circuit's interpretation, a court has subject matter jurisdiction over a tort claim against the government only if a plaintiff's injuries are "wholly unrelated" to flood control activities. *Central Green*, 177 F.3d at 839. If the accident had anything to do with a flood control project, or the management of a flood control project, then the plaintiffs cannot sue. *Cantrell v. United States Department of Army Corps of Engineers*, 89 F.3d 268, 271 (6th Cir. 1996). Even if the only connection between the plaintiff's injury and flood control is the mere fact that Congress authorized the expenditure of funds for flood control purposes, the government has immunity, even if the funds were not actually spent on flood control. *Central Green*, 177 F.3d at 839. With a rule this strict, it is not surprising that

> [t]he circuit courts with the toughest-sounding tests, like the Ninth Circuit, report no cases where the plaintiff's theory of liability did not involve a challenge to the government's flood control activities or the government's decisions about how to maintain flood control waters.

Cantrell v. United States Department of Army Corps of Engineers, 89 F.3d at 273. With a rule that sweeps as broadly as the Ninth Circuit's, nearly every injury will be somehow related to flood control. Consequently, every case is dismissed.

In contrast, in the Tenth Circuit flood control immunity "depends not on the character or origin of the water, but on the purpose of the project and the nature of the activity creating the nexus with the injury." *Williams v. United States*, 957 F.2d 742, 744 (10th Cir. 1992). The Seventh Circuit similarly requires a nexus between the injury and some activity that furthers the purposes of flood control.

> If the Corps of Engineers should allow a walrus-sized pothole to swallow tourists' cars on the way to the beach, or if a tree-trimmer's car should careen through some picnickers, these injuries would be "associated with" flood control. They would occur within the boundaries of the project, and but for the effort to curtail flooding the injuries would not have happened. Yet they would have nothing to do with management of flood waters, and it is hard to conceive that they are "damage from or by floods or flood waters" within the scope of Sec. 702c.

Fryman v. United States, 901 F.2d 79, 81 (7th Cir. 1990). Consequently, the government could not benefit from immunity in such situations.

Plaintiffs in circuits like these can proceed with their lawsuits unless the government shows that some flood control activity is closely related to the injury. A mere connection to

a flood control project is not enough for immunity unless there is a nexus between the injury and some activity in furtherance of a flood control purpose. Consequently, in these other circuits, plaintiffs can recover even if their injuries are closely related to flood control projects. *See, e.g., Cantrell v. United States Department of Army Corps of Engineers*, 89 F.3d 268 (permitting a negligence claim to proceed even where accident arose on a lake used as flood control reservoir where the breach of duty of care was not undertaken to control flooding); *Boyd v. United States*, 881 F.2d 895 (10th Cir. 1989) (suit not barred where plaintiff alleges that government negligently allowed speedboats on the lake without first warning swimmers); *Cox v. United States*, 827 F. Supp. 378 (N.D.W. Va. 1992) (suit not barred where plaintiff alleges that Corps of Engineers negligently allowed children to use a dangerous rope swing near flood control lake). Plainly, the conflict among the circuits as to the meaning of "from or by floods or flood waters" leads to different outcomes in different parts of the country.

Professor Hellman has concluded that "[a] strong signal that a conflict leads to divergent outcomes is the rejection by a court in one circuit of another circuit's precedent." Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 Sup. Ct. Rev. 247, 260-61 (1998). Rejections of other circuit's precedents abound in the Flood Control Act cases. For example, in *Boyd v. United States*, the Tenth Circuit refused to follow the Ninth Circuit's "wholly unrelated" rule. 881 F.2d at 900. In *Morici Corp. v. United States*, the Ninth Circuit expressly rejected the rule followed in the Fourth Circuit. 681 F.2d 645, 647-48 (9th Cir. 1982). In *Dawson v. United States*, the Third Circuit refused to follow the Tenth Circuit, 894 F.2d 70, 73, (3d Cir. 1990). In *Cantrell v. United States Department of Army Corps of Engineers*, the Sixth Circuit rejected the rule followed in the Seventh. 89 F.3d at 274. These dueling standards lead to considerable uncertainty in the application of a federal law

that has not changed. The foremost consideration is, and should be, fairness.

> [T]he fact that a federal statute has been enacted, or a constitutional provision adopted, tells us that the American people have made a decision that a matter should be dealt with in the same way throughout the nation. That determination is also frustrated by differential enforcement of the rights and duties of citizens vis-a-vis one another, when those rights and duties derive from federal law.

Hellman, *By Precedent Unbound* at 757. Justice White reflected this view when he noted that denying review in a conflict case "underlines the fact that . . . citizens in some circuits are subject to liabilities or entitlements that citizens in other circuits are not burdened with or entitled to." *Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990) (White, J., dissenting from denial of certiorari).

As a secondary matter, the existence of these competing rules imposes disparate costs and can lead to inconsistent federal policy. Professor Hellman has noted that

> [o]ne aspect of primary behavior that may be affected even when a conflict relates only to the availability of a damage remedy is insurance coverage. If one circuit imposes liability when another would not, multicircuit actors may feel obliged to buy more insurance, or they may be required to pay higher premiums for the coverage they have.

Hellman, *By Precedent Unbound* at 750. Similarly, farmers such as the Petitioner, who farm land near federally maintained irrigation projects, will likely pay more for flood insurance in the Ninth Circuit, where federal indemnity is not available, than in other circuits where the United States may face liability. Another consequence is that tort law cannot provide government agencies with an incentive to manage water projects with

reasonable care in circuits like the Ninth, as it would in other circuits where there is a threat of liability. Consequently, in some places, administrative agencies of the United States have less incentive to perform their duty to act reasonably in the maintenance of irrigation projects.

A conflict between the circuits is intolerable when it produces different outcomes. There can be no question that the Petitioner's suit would continue if Petitioner had been injured in a different circuit. The Ninth Circuit below admitted as much. Permitting such a disparity to continue not only leads to injustice, but also undermines the very notion of a national law. For these reasons, this Court should grant the petition and resolve this dispute.

II

THE CONFLICT IN THE CIRCUITS CAN BE RESOLVED NOW AND DOES NOT REQUIRE FURTHER PERCOLATION

Several other subtle but significant factors seem to inform this Court's decisions to grant or deny certiorari in cases involving intercircuit conflicts. Is the conflict likely to resolve itself, perhaps because the statute will be repealed or amended? Do the circuits that have addressed the issue appear to be heading toward consensus? Is the conflict current and persistent? Each of these factors, and several similar considerations, seem to involve the question of urgency. Why must this conflict be resolved now? Will there be a better time? Is there a better case for resolving the issue? Does the issue need more "percolation"?

Professor Hellman has explained that "percolation is not viewed as an end in itself, but as a means to an end. The premise is that when the issues have been thoroughly canvassed by courts on both sides of the issue, the conflict will be resolved." Hellman, *By Precedent Unbound* at 700. The time

has come for resolution of this conflict. There is no longer any reason to wait.

The issue is fully developed. Nearly every circuit court in the land has addressed the scope of governmental immunity under the Flood Control Act. *See, e.g., Dawson v. United States*, 894 F.2d 70, 74 (3d Cir. 1990) (following Ninth Circuit's "wholly unrelated" test as appropriate way to determine section 702c immunity); *Hayes v. United States*, 585 F.2d 701, 702-03 (4th Cir. 1978) (holding plaintiff may be able to avoid absolute bar of section 702c if his injury was result of operation of project as recreational facility without regard to its flood control aspects); *Mocklin v. Orleans Levee District*, 877 F.2d 427, 430 (5th Cir. 1989) (following the Ninth Circuit); *Cantrell v. United States Department of Army Corps of Engineers*, 89 F.3d 268, 274 (6th Cir. 1996) (recognizing immunity where there is a connection between federal flood control efforts and the alleged tortious conduct); *Bailey v. United States Department of the Army, Corps of Engineers*, 35 F.3d 1118, 1124 (7th Cir. 1994) (holding that immunity provision applies only if activities at project increased probability of injury to plaintiff); *Zavadil v. United States*, 908 F.2d 334 (8th Cir. 1990) (holding that section 702c immunity applied when governmental control of waters was a "substantial factor" in bringing about injuries); *McCarthy v. United States*, 850 F.2d 558, 562 (9th Cir. 1988) (holding that immunity provision applies unless injury is "wholly unrelated" to flood control); *Boyd v. United States ex rel. United States Army Corps of Engineers*, 881 F.2d 895, 900 (10th Cir. 1989) (holding that immunity provision does not attach when injury results from recreational use of flood control waters). As discussed in this brief, and in the Petitioner's brief, the disagreements between the different circuits are stark and clear. These courts have produced an abundance of opinions on the issue, explaining differences, and justifying holdings. The legal academy has also focused on this issue. *See, e.g.*, Sarah Juvan, Note, *The Federal Flood Control Act: Congressional*

Development of a Modern-Day Ark, 44 Drake L. Rev. 303 (1996); Mary Jean Pedersen, Note, *Boudreau v. United States: Government Immunity Under the Flood Control Act of 1928 and the Effect of Outdated Legislation on Society*, 41 Vill. L. Rev. 1487 (1996); Michael S. Levine, Note, *United States v. James: Expanding the Scope of Sovereign Immunity for Federal Flood Control Activities*, 37 Cath. U. L. Rev. 219 (1987). There is no question that there is a voluminous body of literature to inform the Court's analysis. Included in this mass is the collected wisdom of many federal judges. There is simply little left to say. Further "percolation" of this issue cannot benefit the Court.

The competing rules are relatively self-contained in operation. They are not entangled with procedural questions and do not leave much room for case-by-case evaluation. The question is simple—Was the plaintiff harmed "from or by floods or flood waters"? Each circuit court, regardless of the particular rule applied, asks only whether the injury is sufficiently related to flood control to warrant immunity. Unfortunately, the circuits find immunity at different points along the scale. But, the scope of Flood Control Act immunity is not so intertwined with other issues that one could conclude that the Court's resolution of this conflict would not, in fact, put it to rest.

This conflict is unlikely to be resolved without the aid of this Court. The circuit courts are not heading toward consensus. Even recent decisions reveal the conflict. *Compare Washington v. East Columbia Basin Irrigation District*, 105 F.3d 517, 519 (9th Cir.), *cert. denied*, 118 S. Ct. 364 (1997), *with Holt v. United States*, 46 F.3d 1000, 1004-05 (10th Cir. 1995), *and Boyd v. United States*, 881 F.2d at 899-900. The issue is not stale and the rules are not antiquated. The Federal Reporter and the Federal Supplement reveal a steady stream of cases addressing these issues, with a new decision almost every year. Moreover, Congress is unlikely to act. The

Flood Control Act has been on the books since 1928. The conflict presented here has existed for decades. Justice Stevens has even pointedly invited Congress to resolve the conflict through legislation. *Hiersche v. United States*, 503 U.S. 923, 925-26 (1992). Yet Congress has not acted. When Congress sits on its hands despite a pointed invitation by a Supreme Court Justice, despite decades of disparate treatment under the law, is it reasonable to expect legislation to be forthcoming?

The stakes are high. For plaintiffs like the Petitioner, Flood Control Act immunity guards the door to the courthouse. In some parts of the country, plaintiffs can get into court; in others they cannot. The rule involved here determines whether a remedy is even available. If the government gets immunity, the lawsuit is over, and the plaintiff, or its insurance company, suffers uncompensated losses.

Each of these factors suggest that urgency is required in the resolution of the question presented. Further "percolation" cannot help. Nearly every circuit court has addressed the issue. Thus, the Court can benefit from the judgment of many federal judges and other legal scholars. The conflict between the circuits is clear, the rules are self-contained, and the stakes are high. Since this conflict is unlikely to be resolved without the aid of this Court, the petition should be granted.

III

INTERPRETATION OF THE IMMUNITY PROVISION IS PROPERLY THE FUNCTION OF THIS COURT

In *Hiersche v. United States*, Justice Stevens' opinion "respecting the denial of the petition for writ of certiorari" argues that "Congress, not this Court, has the primary duty to confront the question whether any part of this harsh immunity doctrine should be retained." 503 U.S. at 926. Justice Stevens emphasizes that Flood Control Act immunity is "an anachronism," an "obsolete legislative remnant," an "engine of

injustice." *Id.* Part of the problem is that, when Congress enacted the law, it did not consider the alternative purposes for flood-control projects, such as power generation, recreation, and conservation, along with the impacts of those purposes. *Id.* Is it possible that the Court would invade the province of the legislative branch by granting the petition and resolving this conflict? No.

Congress' position on Flood Control Act immunity is known. Congress has deferred to the courts by doing nothing. Had the legislative branch determined Flood Control Act immunity to be inconsistent with the Federal Tort Claims Act, it could have expressly repealed the immunity provision when the Federal Tort Claims Act was enacted in 1948, as it did with several other statutes. But it did not. *See National Manufacturing Co. v. United States*, 210 F.2d 263, 274 (8th Cir.), *cert. denied*, 347 U.S. 967 (1954). This issue was emphasized again in 1954, when the Eighth Circuit held that the Federal Tort Claims Act did not repeal Flood Control Act immunity by implication. *Id.* Congress did not respond. Justice Stevens drew attention to the many ambiguities in the provision when he dissented from this Court's decision in *United States v. James*. 478 U.S. 597, 612 (1986). Yet Congress preserved the status quo. Finally, Justice Stevens expressly called for congressional action in his opinion respecting the denial of certiorari in *Hiersche*. *Hiersche v. United States*, 503 U.S. at 926. But Congress has done nothing. It is useless for the Court to defer to Congress, in the hopes that Congress will resolve this conflict, when Congress has so clearly left the issue to the courts.

The statute exists. It affects real litigants on a regular basis. It is being applied by district courts and courts of appeals. In each case, the district courts and courts of appeals must interpret the law. Is it somehow more appropriate for the courts of appeals to interpret an existing law than it is for the highest court of the land? Even if the interpretation of this

provision would benefit from some congressional guidance, the court must make due with what it has. At this point, Flood Control Act immunity derives from an existing law, the various interpretations of which prejudice some litigants, and favor others, depending upon what part of the country they are injured in. The different interpretations arise out of a single phrase, "from or by floods or flood waters." The interpretation of pieces of text like this is standard fare for this Court. If Congress has not acted to clarify this law, despite an invitation to do so, it is not right that injustice should persist until it does.

Even if Flood Control Act immunity is an antiquated "engine of injustice," as Justice Stevens has claimed, it is printed in black and white in the U.S. Code. *Hiersche*, 503 U.S. at 926. It has current effects on real plaintiffs. Justice Department attorneys invoke it to avoid liability for the United States. It may be impossible to envision what Congress would have enacted had it considered "the power generation, recreational, and conservation purposes of flood-control projects" that became more important in the decades following the Act's enactment. *Id.* But this Court can determine what the sentence itself means. Doing so would not require any dalliance into the province of the legislative branch. In effect, Congress has decided that the immunity doctrine should be retained by failing to clarify, repeal, or amend it. If it must remain, we must know what it means.

CONCLUSION

Fairness and justice require that federal laws mean the same thing across the Nation. Yet governmental immunity under the Flood Control Act is a hodge-podge of different standards and varying outcomes. Different outcomes are the most important indicator that a conflict between the circuit courts is intolerable and must be resolved. In fact, this conflict is ready to be resolved. The issue has fully "percolated." The Court can benefit from the wisdom of many federal judges and

other legal scholars. Perhaps most importantly, no other body is likely to resolve this conflict. For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

DATED: February, 2000.

Respectfully submitted,

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